Supreme Court, U.S.
FILED
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No.

In The

Supreme Court of the United States

October Term, 1997

ROSLYN NADEL,

Petitioner,

vs.

MORRISTOWN FIRE DEPARTMENT, MORRISTOWN POLICE DEPARTMENT, and MORRISTOWN MEMORIAL HOSPITAL,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey Appellate Division

PETITION FOR WRIT OF CERTIORARI

ROSLYN NADEL
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63 pp

QUESTION PRESENTED

1. Whether the disabled are protected under the Federal Civil Rights Act 42 U.S.C.A. § 1983 and 42 U.S.C.A. § 12132.

2. Whether the disabled have the same protection under the Fourth, Eighth and Fourteenth Amendments to the United States Constitution as the nondisabled have.

3. Whether the disabled are being protected under the Americans with Disabilities Act from discriminatory behavior from public entities and hospitals.

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Roslyn Nadel respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of New Jersey, Appellate Division.

OPINIONS BELOW

The opinion of the Appellate Division is unreported. The opinion of the Supreme Court is unreported.

STATEMENT OF JURISDICTION

The Supreme Court entered its judgment on January 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

Petitioner having asserted below and intending here to assert deprivation of rights secured by the Constitution of the United States. Also Petitioner asserts that her civil rights under the Federal Civil Rights Act 42 U.S.C.A. § 1983 and 42 U.S.C.A. § 12132 as well as the Americans with Disabilities Act Title 11 and the Rehabilitation Act of 1973 were violated.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution, which states in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated.

This case involves the Eighth Amendment to the United States Constitution, which states in pertinent part: to protect

against imposition of cruel and unusual punishment, and the Fourteenth Amendment to the United States Constitution, which states in pertinent part:

> Nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES INVOLVED

This case involves 42 U.S.C.A. § 1983, which states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law.

This case involves 42 U.S.C.A. § 12132 which states in pertinent part:

> No qualified individual with a disability shall by reasons of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity.

This case involves the Rehabilitation Act and the Americans with Disabilities Act (ADA). Many of the ADA provisions are

borrowed from Section 504 of the Rehabilitation Act of 1973 which prohibits discrimination on the basis of disability by any entity that receives federal funding.

> As cited in *The Americans with Disabilities Act,* Public Law 101-336, prohibits discrimination on the basis of disability by any state or local government or their agencies. Covered entities are police and fire departments.

"The purpose of the law is to provide uniform protection against discrimination throughout the United States."

STATEMENT OF THE CASE

This action for compensatory and punitive damages arises from an incident on February 14, 1992 when Petitioner, Nadel, suffered an epileptic seizure in Morristown, New Jersey. Morristown Firemen arrived and held Petitioner down and called the Morristown Police and ambulance squad, despite the fact that a friend was present and explained that it was just a seizure and not serious. The ambulance squad transported Nadel to Morristown Memorial Hospital (MMH), where she was restrained to a bed for three to four hours, and denied the right to make a telephone call to her Attorney.

Petitioner brought suit against the Morristown Fire and Police Departments (Morristown Defendants) for battery and false imprisonment (State Tort Claims), and for violations of her Federal Rights under the Americans with Disabilities Act, Rehabilitation Act of 1973, and Section 1983 of the Civil Rights Act of 1964, Nadel also asserted a claim against MMH in which she alleges battery and false imprisonment.

Petitioner initially raised the Federal questions in a letter memorandum in opposition to a Motion for Summary Judgment

which was filed on August 23, 1994 in the Superior Court in Morristown, New Jersey. Petitioner again raised the Federal questions when she wrote out her Amended Complaint which was filed on October 7, 1994. (App. A).

On the Morristown Defendants' Motion for Summary Judgment, Judge Friend dismissed Plaintiffs' case against the Morristown Defendants for failure to comply with the notice requirements of the New Jersey Tort Claims Act, and dismissed Plaintiffs' federal claim on a jurisdictional basis, ruling that the Federal Court was the exclusive forum for Plaintiff's federal claims. (App. B). Several years later Judge Weinstein granted defendant MMH's Motion for Summary Judgment because Plaintiff failed to provide expert testimony and because the evidence otherwise was so overwhelmingly one-sided in favor of defendant MMH on the perceived malpractice claim. (App. C.).

On appeal, Judges King, Conley and Loftus concluded that the summary judgment rulings in Defendants' favor were correct, but, in several instances, for somewhat different reasons than advanced in the Law Division. (App. D). The Appellate Division denied rehearing. (App. E).

Petition for Certification was denied by the Supreme Court of New Jersey (App. F) and the Court denied rehearing. (App. G).

HOW THE FEDERAL QUESTIONS WERE PRESENTED AND DECIDED BELOW

On direct appeal to the Supreme Court of New Jersey, Petitioner asserted that the Appellate Division erred in affirming the Lower Courts decision in dismissing this case because the Judges did not acknowledge some of the arguments that were raised in Petitioners' brief.

A. Section 1983 and its Significance to Other Laws

This case involves the Federal Civil Rights Act 42 U.S.C.A. § 1983 and how Federal Acts and Laws supersede State Laws (The New Jersey Tort Claims Act).

Implicitly stated in the *Tort Claims Act* 59:3-1 4:

Civil rights violations. Pg. 234.

> State law immunities do not protect public employees from claims under federal civil rights statute (42 U.S.C.A. Section 1983. *Hayes v. Mercer County*, 217 N.J. Super. 614, 526 A2d. 737 (A.D. 1987) certification denied 108 N.J. 643, 532 A.2d 226.

Also stated in the *Tort Claims Act* 59:3-2 5:

Federal rights violations. Pg. 238.

> The New Jersey Tort Claims Act which excuses municipalities and their officials from liability with respect to discretionary acts did not bar suit against municipality and officers of municipality charging violation of federal rights. *T & M Homes, Inc. v. Mansfield Tp.* 162 N.J. Super. 497, 393, A.2d 613 (1978).

Petitioners' Federal Rights were violated, therefore the Tort Claims Act is not applicable.

The Court stated in *Fuchilla v. Layman* 537 *Atlantic Reporter*,

> As a federal statute, however, section 1983 is entitled to the protection of the Supremacy Clause, article VI, of the United States Constitution, which precludes state laws that thwart the purposes of federal legislation. *McGlynn v. New Jersey Pub. Broadcasting Auth.*, 88 N.J. 112, 137, 439, A.2d 54 (1981). Barring a section 1983 claim for failure to satisfy the notice provisions of the Act would permit state legislation to deny a federal right in violation of the Supremacy Clause. See *T & M Homes, Inc, v. Township of Mansfield*, 162 N.J. Super. 497, 393 A.2d 613 (Law Div. 1978). Accordingly, we hold that the notice provisions of the Act do not apply to plaintiff's section 1983 claims. *See Lloyd v. Stone Habor,* 179 N.J. Super. 496, 432 A.2d 572 (Ch. Div. 1981).

As cited in *T & M Homes Inc. v. Township of Mansfield* 162 N.J. Super. "The Court reconsidered the legislation history first reviewed in *Monroe* and concluded that it did not support municipal immunity." Accordingly, it held that

> Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like any other § 1983 "person", by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to

> governmental "customs" even though such a custom has not received formal approval through the body's official decisionmaking channels. [at __, 98 S. Ct. at 2036; footnotes omitted].
>
> The Supreme Court stressed the necessity for finding an official government policy or custom, holding that municipalities are not liable for actions of its employees or agents on the basis of respondeat superior.

What happened to Petitioner by the Morristown Defendants is not an isolated incident. Petitioner had a seizure and the public entities would not let her go on her way. Petitioner alleges that firemen and policemen are not adequately trained to determine whether an individual is acting strangely because of a disability. Therefore it has become a custom for public entities to treat epileptics in a discriminatory way.

The Court stated in *Fuchilla v. Layman*, 510 A.2d 281 (N.J. Super A.D. 1986):

> The only New Jersey authority directly on point is *Lloyd v. Stone Habor supra*, 179 N.J. Super. at 512, 432 A.2d 572, in which Judge Haines correctly held that a 1983 claim is, "unaffected by plaintiff's failure to give the notice required by the Tort Claims Act." *And see T & M Homes Inc. v. Mansfield TP.*, 162 N.J. Super. 497, 506, 393 A2d 613 Law Div. 1978 where Judge Haines also had noted that federal
>
> . . . rights, cannot be denied by the passing of state legislation. If the contrary were true, every state could deprive its citizens of the very rights which enactments of the Federal Congress are designed to protect.

As cited in Federal Civil Rights Acts, Pg. 136, *Canton v. Harris* (1989, U.S.) 103 L. Ed. 2d 412, 426, 109 S. Ct. 1197.

> The Supreme Court has now held that municipality liability under § 1983 may, under circumstances, be premised upon its failure to train its employees. The Court ruled that inadequacy of police training may serve as the basis of municipality liability "only when the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."

Morristown is liable under Section 1983 for its failure to train the Town's Firemen and Policemen in dealing with the disabled. "In 1992 it was estimated that there were more than 809,000 people in New Jersey who are disabled." A report found in "Americans With Disabilities; 1991-92", Series P 70-33 showed that 48.9 million persons had a disability, and 24.1 million of that total had a severe disability." It is essential for firemen and policemen to have proper training concerning disabilities and to know how to react to the disabled if they act differently.

B. The United States Constitution and its Importance to Petitioners' Case

This case involves Petitioner's Constitutional Rights which were violated by Morristown Fire Department and Morristown Police Department. Petitioner alleges that her Fourth, Eighth and Fourteenth Amendments were violated by the Morristown Defendants.

As stated in the *Federal Civil Rights Act:* 126. Fourth Amendment Rights; Freedom From Illegal Seizure Of Persons:

Under Section 1983 a person can be safeguarded in his right to be free from illegal arrests, and, indeed, from an illegal seizure of his person. A federal court typically states: "As a general rule, an arrest, lacking an appropriate warrant or without probable cause, constitutes a violation of due process, giving rise to a claim under 1983." The Court of Appeals for the Fourth Circuit ably states:

> That an infringement of personal liberty such as follows from an unconstitutional arrest has resulted in but a short period of restraint or has involved no physical injury may go in mitigation of damages but it manifestly cannot immunize the constitutional deprivation or abort an aggrieved plaintiff's right of action under Section 1983. . . . There is no justification for the incorporation of a de minimus rule by way of a limitation on the right of action by an individual for an admitted violation of constitutional rights. There is no warrant for separation of constitutional rights into redressable rights and unredressable rights, of major and minor unconstitutional deprivations, and Section 1983 makes no such distinction and authorizes no such separation.

Petitioners' Fourth Amendment Rights were violated when the Morristown Defendants seized her and interfered with her locomotion. Any seizure is an illegal arrest and the duration of time does not matter. What is important is that Petitioner was detained against her will because of having an epileptic seizure.

Also, Petitioners' Eighth Amendment Rights: which is Cruel and Unusual Punishment, were violated by the Morristown Defendants when they seized her and restrained her because of a disability.

Petitioner asserts that the Equal Protection Clause of the Fourteenth Amendment was violated by Morristown Public Entities. The Equal Protection Clause of the Fourteenth Amendment forms the basis of Constitutional protection against discrimination:

> "It says," [Nor], shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> The clause outlaws a denial of equal protection of the laws; in other words, it prohibits discrimination. Any person within a state's jurisdiction is constitutionally entitled to be treated equitably, to be free from arbitrary and unreasonable treatment at the hands of the state government.

Petitioner suffered from arbitrary and unreasonable treatment by the Morristown Defendants when they seized her and would not let her go on her way after the seizure. The Morristown Defendants should be held accountable for their actions under Section 1983 and the Constitution of the United States.

C. The Americans with Disabilities Act: How it Prohibits Discrimination by Public Entities

As cited in 42 U.S.C.A. § 12132, pg. 663 and also found in Title II of the Americans with Disabilities Act:

> No qualified individual with a disability shall by reason of such disability . . . be subjected to discrimination by any such entity.

The public entity can be considered to have discriminated against a qualified individual if it has not properly trained its employees in the area of disabilities, i.e., epilepsy. Petitioner claims that she was discriminated against because the Morristown Defendants did not properly handle her epileptic seizure. If the firemen and policemen had been properly trained, they would have known that they should never have touched Nadel when she was having an epileptic seizure or coming out of the seizure.

In a brochure by the Police Executive Research Forum and the Epilepsy Foundation of America: *TAKE ANOTHER LOOK:*

> People with epilepsy are not dangerous to others and should be treated with the same respect as any other person; A person who's having a seizure should not be forcibly restrained, held down, or grabbed. Doing so will increase agitation and may trigger an aggressive reaction.
>
> A Professional Response:
>
> A professional police response to seizures and epilepsy means being able to recognize seizures symptoms. It means handling an episode of altered awareness while protecting individual rights. It means being aware that discriminatory treatment of people with epilepsy or other disabilities is a violations of the Americans with Disabilities Act.
>
> Above all, a professional police response to epilepsy means taking another look whenever faced with unusual behavior or confused response, and always considering the possibility that a seizure could be the cause of it.

Protecting Civil Rights:

Police officers should always consider the possibility that a disability is involved when faced with impaired responsiveness or behavior that doesn't seem to make sense, or when called to a situation when someone is said to be "acting strangely".

The Americans with Disabilities Act prohibits discriminatory treatment of people with all types of disabilities, including epilepsy. Taking people into custody solely because of actions or behaviour caused by disability deprives them of their rights and may be a violation of the Act.

Is An Ambulance Needed:

Emergency medical care is usually not required when someone with epilepsy has a seizure that ends without difficulty after a minute or two. An ambulance should be called if another seizure begins shortly after the first, if confusion has been prolonged and does not improve, or if a convulsive seizure lasts more than five minutes. An ambulance should also be called if the person having the seizure is sick, injured, diabetic, pregnant, experienced the seizure following cocaine or other drug use, is having a first-ever seizure, or fails to regain consciousness after muscle spasms subside.

Petitioners' friend Michael (who was with her at the time) told the firemen that Nadel had seizures before. Since the firemen were aware that Nadel was subject to seizures it was not necessary to call the police and ambulance.

It is essential for firemen and policemen to be trained in the above since public entities come in contact with the disabled constantly. With more disabled in the communities then ever before because of deinstitutionalization it is critical for firemen and policemen to have training to know how to deal with the disabled, in every situation, especially when they are in a crisis situation.

As stated in the *Americans With Disabilities Act Handbook,* pg. 120:

> In order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for seizures. Often, after being arrested, they are deprived of medications while in jail, resulted in further seizures. Such discriminatory treatment based on disability can be avoided by proper training.

Only when public entities are trained in the area of disabilities, and become sensitized to the disabled, will they realize that if someone is acting strangely it may be caused by a disability not because the individual is on drugs or has committed a criminal offense.

As stated in the *Americans With Disabilities Act Handbook,* Title II § 35.130. Regulation: Subpart B — General Requirements #35.130 General prohibitions against discrimination.

> (a) No qualified individual with a disability shall, on the basis of disability, be excluded from

> participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

As stated in the *Americans With Disabilities Act Handbook*, Title II § 35.130. Analysis: Subpart B — General Requirements: #35.130 General prohibitions against discrimination.

> A number of commenters asked that the regulation be amended to require training of law enforcement personnel to recognize the difference between criminal activity and the effects of seizure or other disabilities such as mental retardation, cerebral palsy, traumatic brain injury, mental illness or deafness. Several disabled commenters gave personnel statements about the abuse they had received at the hands of law enforcement personnel. Two organizations that commented cited the Judiciary report at 50 as authority to require law enforcement training.

Unless firemen and policemen receive adequate training in dealing with the disabled, this unnecessary abuse will continue.

Petitioner asserts that Morristown Memorial Hospital also is in violation of the Americans with Disabilities Act by restraining Nadel to a bed for three to four hours for having an epileptic seizure, without allowing her to make a telephone call

REASONS FOR GRANTING THE WRIT

The Constitution and the Americans with Disabilities Act were written to protect the disabled against arbitrary discrimination from public entities. However, laws are only

beneficial if they are enforced, therefore, it is up to the Supreme Court to establish guidelines and procedures for State Courts to follow for the protection of all disabled who walk the streets. Therefore the disabled will enjoy the protections of the United States Constitution and the Americans with Disabilities Act. With more disabled walking the streets than ever before because of deinstitutionalization it is critical for firemen and policemen to have training to know how to deal with the disabled in every situation, especially when they are in a crisis situation.

Only when public entities have adequate training will they be in full compliance of Title 11 of the Americans with Disabilities Act. Also the disabled will be able to walk the streets without fear of being apprehended by public entities and restrained to a bed by hospitals because they are different than "normal" people. *Roslyn Nadel v. Morristown Fire Department, et al.*, gives the United States Supreme Court a unique opportunity to establish guidelines for the protection of the most vulnerable citizens the (disabled). Only then can the disabled enjoy the Civil Rights they are entitled to have in the United States of America.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that her Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — AMENDED COMPLAINT OF THE SUPERIOR COURT OF NEW JERSEY, MORRIS COUNTY LAW DIVISION FILED OCTOBER 7, 1994

Roslyn Nadel (Pro Se)
333 West State Street, Apt. 4h
Trenton, New Jersey 08618
(609) 278-9693
Plaintiff

SUPERIOR COURT OF NEW JERSEY
MORRIS COUNTY; LAW DIVISION:
DOCKET NO. MRS-L-484-94

CIVIL ACTION

ROSLYN NADEL (Pro Se)

Plaintiff,

V

MORRISTOWN FIRE DEPARTMENT
MORRISTOWN POLICE DEPARTMENT
MORRISTOWN MEMORIAL HOSPITAL

Defendants,

AMENDED COMPLAINT

COMPLAINT

Now comes the Plaintiff, Roslyn Nadel, (Pro Se) by and through her attorney Roslyn Nadel (Pro Se) and complaining

against Defendants, James M. Schultz and James Stanton, and John Doe, and alleges as follows

JURISDICTION

1. This action is brought pursuant to 42 U.S.C.S. § 1983 and 42 USCS § 12131 under the Americans with Disabilities Act, Title II, 1990, and § 504 of the Rehabilitation Act, 1973.

2. The amount in controversy exceeds $50,000. exclusive of interest and costs.

3. Venue is placed in this district because it is where all the parties reside and where the events complained of occurred.

4. Plaintiff, Roslyn Nadel, is a citizen of the United States, a resident of the State of New Jersey and of the Town of Trenton, New Jersey.

5. Defendant, James M. Schultz, was at all times pertinent to the allegations of this Complaint, a fireman employed by the Town of Morristown Fire Department. He is sued in his official capacity.

6. Defendant, James Denton, was at all times pertinent to the allegations of this Complaint a Fireman employed by the Morristown Fire Department. He is sued in his official capacity.

7. Defendant John Doe was at all times pertinent to the allegations of this Complaint a Policeman employed by

the Morristown Police Department. He is sued in his official capacity.

8. At all times relevant to the allegations of this complaint and in all actions of the Defendants alleged herein, Defendants were acting under the color of law and pursuant to their authority as Firemen and Police Officers of the Town of Morristown.

COUNT 1

9. On or about February 14, 1992 Plaintiff was crossing Speedwell Avenue with a friend named Michael. Plaintiff suffers from psychomotor epilepsy. Halfway across the street Plaintiff felt a seizure coming on. When Plaintiff regained consciousness, she was laying on the sidewalk and her friend was gone. Two firemen were holding Plaintiff, Roslyn Nadel, down.

10. Plaintiff, Roslyn Nadel, repeatedly said "Please let me up, please let me up". The firemen would not let Plaintiff Roslyn Nadel up.

11. A police car and an ambulance arrived on Speedwell Avenue. Whereas, plaintiff, Roslyn Nadel, was put on a stretcher and strapped in. The Policeman got on the ambulance also. The ambulance took plaintiff to Morristown Memorial Hospital.

12. Whereas, plaintiff, Roslyn Nadel, was put in a room and restrained to bed. Plaintiff, Roslyn Nadel was not even allowed to make a phone call. Since Roslyn Nadel had been in this hospital for five surgical operations, including emergencies, the hospital should have at the least, immediately notified her personal physician.

13. After four hours restraint in bed, a nurse finally made a phone call for plaintiff, Roslyn Nadel, to an Attorney, Ira Ginsburg, Esq. who came and took plaintiff to her apartment.

14. During the course of said hospital confinement, plaintiff was denied rights afforded to her by the Statutes of the State of New Jersey, the United States of America and the Constitution of the State of New Jersey and the United States of America. Events which took place which constituted a denial of plaintiff's rights included but were not limited to disgrace, humiliation and shame. Plaintiff has also been caused to suffer emotional stress and nervous shock. Plaintiff became depressed and began to experience symptoms of a Post-Traumatic Distress Disorder.

15. Citing Fuchilla v. Layman, 109 N.J. 319

> The law contains no limitations or other procedural requirements for claimants who elect to proceed in the Superior Court. Additionally, the 1977 amendment extending the definition of "employers" to include public entities, N.J.S.A. 10:5-5(e), reflects the Legislature's intention to subject those entities to the procedures of the Law.

16. The Americans with Disabilities Act Handbook, states: "In order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for seizures. Often, after being arrested, they are deprived of medications while in jail, resulting in further seizures. Such discriminatory treatment based on disability can be avoided by proper training."

Appendix A

17. As cited in United States Code Service 42 USCS The Public Health and Welfare,

12132 DISCRIMINATION

> Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity. (July 26, 1990, P.L. 101-336, Title II, Subtitle A, 202, 104 Stat. 337.)

18. According to the brochure distributed by the Epilepsy Foundation of America, and the Police Executive Research Forum. "People with epilepsy are not dangerous to others and should be treated with the same respect as to any other persons. A person who's having a seizure should not be forcibly restrained, held down, or grabbed. Doing so will increase agitation and may trigger an aggressive reaction. Failure to follow police directions during a seizure is not a deliberate act."

19. Citing City of Canton, Ohio v. Harris, 489 U.S. 379, 109 S.Ct. 1197 (1989)

> A municipality may, in certain circumstances, be held liable under § 1983 for constitutional violations resulting from its failure to train its employees.

20. Citing Monell v. New York City Dept. of Social Services 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978),

> that municipalities like other state actors, are subject to liability under 1983 when their policies

"subject or cause to be subjected, any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution". 42 U.S.C. § 1983.

21. The acts of Defendants described above were all performed under color of State Law, disregarding plaintiff's rights under the Fourteenth Amendment to the Constitution. Under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, plaintiff was discriminated against.

22. As a result of said act, plaintiff has suffered pain and suffering.

WHEREFORE, Plaintiff, Roslyn Nadel requests the following relief against the Defendants jointly and severally:

A. Compensatory damages of $100,000.

B. Punitive damages of $250,000.

C. Such other relief as to the Court appears reasonable and just.

Dated: October 7, 1994

s/ Roslyn Nadel
ROSLYN NADEL

APPENDIX B — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, MORRIS COUNTY LAW DIVISION DISMISSING COMPLAINT AGAINST MORRISTOWN FIRE DEPARTMENT AND MORRISTOWN POLICE DEPARTMENT FILED OCTOBER 18, 1994

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SUPERIOR COURT OF NEW JERSEY
MORRIS COUNTY: LAW DIVISION
DOCKET NO: MRS-L-484-94

CIVIL ACTION

ROSLYN NADEL (Pro Se)

Plaintiff,

MORRISTOWN FIRE DEPARTMENT, MORRISTOWN POLICE DEPARTMENT and MORRISTOWN MEMORIAL HOSPITAL

Defendants.

ORDER

Dismissing Complaint against Morristown Fire Department and Morristown Police Department ***only****.*

Appendix B

THIS MATTER being opened to the Court by Herbert A. Vogel, Esq., attorney for the Town of Morristown, Laura J. Lande, Esq. appearing, and the matter having been considered by the Court, and for good cause shown:

IT IS on this 18th day of October 1994,

ORDERED that summary judgment is granted in favor of defendants, ~~Town of Morristown~~, and the Complaint against the Morristown Police Department, and the Morristown Fire Department is hereby dismissed with prejudice.

IT IS FURTHER ORDERED that a copy of this Order be served upon the plaintiff pro se and counsel for the Morristown Memorial Hospital within 7 days from the date hereof.

s/ Herbert S. Friend J.S.C.

HERBERT S. FRIEND
Judge Superior Court

The plaintiff in her Complaint and Amended Complaint does not state a basis for relief in this Court. On the Tort Claim issues, Plaintiff failed to comply with the Notice requirements under the New Jersey Tort Claims Act N.J.S.A. 59:1-1 et seq. On the issues arising out of the Americans with Disabilities Act and/or the Federal Civil Rights Act, the proper forum is the Federal Court. The Complaint against Morristown Memorial Hospital is not dismissed.

APPENDIX C — ORDER OF THE OF THE SUPERIOR COURT OF NEW JERSEY, MORRIS COUNTY LAW DIVISION GRANTING SUMMARY JUDGMENT FILED MARCH 20, 1996

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — MORRIS COUNTY
DOCKET NO. MRS L-484-94

Civil Action

ROSLYN NADEL (pro se)

Plaintiff(s),

vs.

MORRISTOWN FIRE DEPARTMENT, et al,

Defendant(s).

ORDER
FOR SUMMARY JUDGMENT

THIS MATTER having been brought before the Court on the motion of Fost, Muscio & Caruso, attorneys for defendant Morristown Memorial Hospital, and the Court having reviewed the moving papers and Memorandum of Law in support thereof, and good cause having been shown;

Appendix C

IT IS ON THIS 20th day of MARCH, 1996, ORDERED that defendant's motion for summary judgment shall be and is hereby granted and any and all claims against Morristown Memorial Hospital shall be and are hereby dismissed with prejudice.

s/ Lewis J. Weinstein
J.S.C.
LEWIS J. WEINSTEIN, J.S.C.

Opposed ✘ Unopposed

APPENDIX D — OPINION OF THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DECIDED MAY 28, 1997

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5197-95T1

ROSLYN NADEL,

Plaintiff-Appellant,

v.

MORRISTOWN FIRE DEPARTMENT, MORRISTOWN POLICE DEPARTMENT and MORRISTOWN MEMORIAL HOSPITAL,

Defendants-Respondents.

Submitted: April 23, 1997 — **Decided:** MAY 28 1997

Before Judges King, Conley and Loftus.

On appeal from the Superior Court of New Jersey, Law Division, Morris County.

Roslyn Nadel, appellant, filed a brief *pro se*.

Vogel Chait Schwartz & Collins, attorneys for respondents Morristown Fire Department and Morristown Police Department (Laura J. Lande, on the brief).

Appendix D

Fost, Muscio and Caruso, attorneys for respondent Morristown Memorial Hospital (Amy Lynn Fenno, on the brief).

PER CURIAM

I.

This action for compensatory and punitive damages arises from an incident on February 14, 1992 where plaintiff suffered an epileptic seizure in Morristown. Two Morristown firefighters arrived and held plaintiff down until the Morristown police and ambulance arrived. The ambulance squad transported plaintiff to Morristown Memorial Hospital (MME), where she was restrained for about three or four hours.

Plaintiff filed this action *pro se* on February 14, 1994. While her pleadings are somewhat unclear, we conclude from a review of the record that plaintiff asserted a claim against the Morristown Police and Fire Departments (Morristown defendants) for battery and false imprisonment (state tort claims), and for violations of her federal rights under the Americans with Disabilities Act (ADA), the Rehabilitation Act of 1973, and Section 1983 of the Civil Rights Act of 1964. Plaintiff also asserted a claim against MMH in which she alleges is battery and false imprisonment; the hospital contends that this action is in reality a medical malpractice claim.

On the Morristown defendants' motion for summary judgment, Judge Friend dismissed plaintiff's state tort claims against the Morristown defendants for plaintiff's failure to comply with the notice requirements of the New Jersey Tort Claims Act, and dismissed plaintiff's federal claims on a jurisdictional basis, ruling that the federal court was the exclusive forum for plaintiff's federal

claims. Several years later Judge Weinstein granted defendant MMH's motion for summary judgment because plaintiff failed to provide expert testimony and because the evidence otherwise was "so overwhelmingly one-sided" in favor of defendant MMH on the perceived malpractice claim.

The issues on this appeal are:

I. WHETHER JUDGE FRIEND PROPERLY DISMISSED PLAINTIFF'S STATE TORT CLAIMS FOR FAILURE TO COMPLY WITH THE NOTICE PROVISIONS OF THE TORT CLAIMS ACT.

II. WHETHER THE JUDGE ERRED IN DISMISSING PLAINTIFF'S FEDERAL CLAIMS BASED ON A FINDING THAT THE FEDERAL COURT IS THE PROPER FORUM FOR PLAINTIFF'S FEDERAL CLAIMS.

A. THE ADA CLAIM

B. THE REHABILITATION ACT CLAIM

C. THE CLAIM UNDER THE FEDERAL CIVIL RIGHTS ACT § 1983.

III. WHETHER JUDGE WEINSTEIN ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF MMH.

We conclude that the summary judgment rulings in defendants' favor were correct but, in several instances, for somewhat different reasons than advanced in the Law Division.

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II.

On February 14, 1994 plaintiff Roslyn Nadel filed a complaint for damages against defendants Morristown Fire Department, Morristown Police Department, and Morristown Memorial Hospital, claiming that she was unlawfully arrested and detained against her will after having an epileptic seizure. The alleged incident occurred on February 14, 1992, exactly two years before plaintiff brought this action. According to plaintiff, she suffers from psychomotor epilepsy. Plaintiff suffered an epileptic seizure on February 14, 1992 while crossing Speedwell Avenue in Morristown with a friend. Plaintiff claims that when she "regained consciousness, she was laying on the sidewalk and her friend was gone." Plaintiff's friend told her that he had informed the firefighter, before he walked away, that she suffers from seizures.

According to plaintiff, two firefighters were holding plaintiff down as she repeatedly requested "Please let me up, Please let me up." Plaintiff claimed the firefighters "would not let [her] up." Plaintiff contends that when the police and ambulance arrived, the ambulance squad "put [plaintiff] on a stretcher and strapped her in" and transported her to Morristown Memorial Hospital.

In a March 14, 1994 memorandum of the event, firefighter James M. Schultz explained that while on his way to the Speedwell Avenue Fire House with fellow firefighter, Stanton, he and Stanton "observed a woman lying in a gutter in front of the West Tower of Headquarters Place on Speedwell Avenue in Morristown". The firefighters immediately notified the Morristown Police Department via radio. He further explained that:

> Firefighter Stanton and I approached the woman and asked her if she was okay. Her response was not

> understood as her verbalization was impaired and she appeared disoriented. Upon standing up, she started to walk into traffic and was almost hit by an approaching vehicle. Firefighter Stanton and I positioned ourselves in such a manner so as to prevent the woman from hurting herself until someone could assess her condition. We continued to try and communicate with the woman at this time to determine the nature of her injury/illness. This woman became agitated and attempts to communicate became futile. A bystander approached us and indicated that she suffered from seizures. When I attempted to get the woman's seizure history (*i.e.*, how often she had them, was she on medication, what was her normal state after seizure, how long they lasted, etc.), the bystander just walked away repeating that she suffered from seizures before.

After advising the Morristown patrolmen, the Morristown Ambulance Squad and the Mobile Intensive Care Unit of Morristown Memorial Hospital of the situation, Schultz said that he and Stanton turned the woman over to the care of the ambulance squad. Schultz noted that "the woman became very hostile and combative." The firefighters then returned to the firehouse and reported the incident to their Captain.

Upon arrival at MMH, plaintiff alleges that she was restrained in a bed for four hours and denied the opportunity to use the telephone. The MMH emergency room progress notes indicate that plaintiff was "agitated and screaming." The notes also state that plaintiff was "pulling [at] wrist restraints" and stated "I'm going to sue all of you." Plaintiff's MMH hospital chart from a prior admission was obtained, which indicated that plaintiff "has [a

history of] sociopathic behavior." After plaintiff calmed down, she was able to make a telephone call, "taken off [the] stretcher" and her "restraints [were] removed." When plaintiff made the telephone call, she contacted an attorney, Ira Ginsberg, who later picked her up from the hospital. The record does not indicate that plaintiff signed a consent form but it does indicate that she refused to "answer questions."

Plaintiff claims that as a result of the February 12 incident, she "has been caused to suffer disgrace, humiliation, and shame. Plaintiff has also been caused to suffer emotional distress, and nervous shock, all to plaintiff's damage." She demanded "general compensatory and punitive damages." After the incident plaintiff requested that her neurologist Dr. Melvin Vigman refer her to a psychiatrist. Dr. Vigman referred plaintiff to David G. Miller, M.D., who explains in a letter dated October 19, 1992 that he has been treating plaintiff since March 16, 1992. Miller said that when he first examined plaintiff, she was suffering from "a Major Depressive Disorder, as well as Post-Traumatic Stress Disorder." Dr. Miller explained that plaintiff's symptoms have improved since he started treating her psychotherapeutically.

Dr. Miller noted that plaintiff has had "a very traumatic life composed of multiple physical handicaps, long term involuntary hospitalization during her childhood, and chronic medical problems. . . ." Dr. Miller said that plaintiff was a student at Trenton State College but was forced to discontinue her studies as a result of a 1989 accident when plaintiff was struck by a car. Following her 1989 accident, plaintiff was hospitalized at MMH. Miller thought that plaintiff's treatment at MMH following the February 14, 1992 incident, "reactivated many of her fears and negative reactions which had occurred during her previous treatment at Morristown Memorial Hospital in 1989."

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Plaintiff claims that on about June 26, 1992 she retained an attorney, Edward Gaffney, to handle her case. Plaintiff claims Gaffney maintained poor communication with her and she eventually discovered that he failed to file her complaint. According to plaintiff, Gaffney was eventually disbarred for similar treatment of other clients. Plaintiff claims that she has contacted over fifty attorneys but none "are interested [in representing her) either because of conflict of interest or [a] problem with contingency fees. " Plaintiff also explains that she has been unsuccessful in retaining a medical expert to testify in her case, even though she has contacted "approximately 15 expert witnesses." According to plaintiff these experts "refuse to discuss the case except with an [a]ttorney, which she has been unable to get." Thus, plaintiff filed the present action *pro se* on February 14, 1994.

III (a).

THE CLAIM AGAINST THE FIRE AND POLICE DEPARTMENTS

On March 25, 1994 defendants Morristown Fire and Police Departments (Morristown defendants) filed a motion for summary judgment on June 22, 1994 claiming that plaintiff failed to comply with notice requirements of the Tort Claims Act, *N.J.S.A.* 59:1-1 to 12-3. By letter-brief filed August 23, 1994 plaintiff opposed defendants' motion for summary judgment, claiming that the Tort Claims Act did not bar plaintiff's claims against Morristown defendants because this case involves alleged violations of federal rights. By memorandum of August 29, 1994 Morristown defendants filed a reply, claiming that plaintiff's complaint did not allege violations of her federal rights. On October 7, 1994 plaintiff filed a response, claiming that the notice requirements were not applicable in the present case because the notice requirements only apply in

"administrative actions before the Division" and not where "a claimant[ ] elects to proceed in the Superior Court." Plaintiff also filed both a notice of motion to file an amended complaint and an amended complaint on October 7, 1994 to include her federal claims, including claims under the Federal Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and the Rehabilitation Act of 1973 against the Morristown defendants. Morristown defendants opposed the motion to file an amended complaint by letter of October 14, 1994.

By order of October 18, 1994 Judge Friend dismissed plaintiff's complaints against the Morristown Fire Department and the Morristown Police Department for failure to comply with the Tort Claims Act. Judge Friend ruled that the proper forum is the federal court on "the issues arising out of the Americans with Disabilities Act and/or the Federal Civil Rights Act. . . ."[1] Judge Friend did not dismiss the complaint against Morristown Memorial Hospital.

III (b)

The Claim Against the Morristown Memorial Hospital

On March 23, 1994 defendant Morristown Memorial Hospital (MMH) filed an answer, generally denying plaintiff's allegations against MMH. On March 8, 1995 defendant MMH filed a motion to compel compliance with discovery or, in the alternative, dismiss plaintiff's complaint for failure to comply with discovery. According to MMH, plaintiff failed to adequately respond to interrogatories and failed to "provide names and addresses, and any reports by any medical experts she intends to rely upon in this case." By

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1. Judge Friend made no specific ruling on the motion to file an amended complaint but it appears, based on this order, that he implicitly granted the motion.

order of May 2, 1995 Judge Friend ordered plaintiff to fully respond to MMH's interrogatories, provide copies of any expert reports within sixty days of the order, and provide signed medical authorizations within twenty days of the order. The judge further ordered "that if plaintiff does not provide the required discovery within the prescribed time, upon motion, with notice to plaintiff, Complaint may be dismissed with prejudice as to defendant Morristown Memorial Hospital."

Defendant MMH filed a motion to dismiss on August 7, 1995 for failure to comply with the May 2, 1995 order. On September 29, 1995 plaintiff filed opposition to defendant MMH's motion to dismiss, explaining that she had difficulty securing an expert willing to testify on her behalf but "finally found an expert witness that will testify . . . , [Dr. Phyllis G. Weisberg]." Plaintiff provided defendant MMH with a letter, dated August 31, 1995, from Phyllis G. Weisberg, Ph.D., Professor and Graduate Coordinator at Trenton State College (TSC). Plaintiff was a student of Weisberg's while plaintiff was enrolled in the Department of Special Education at TSC. Weisberg explained that treatment for epileptic seizures vary, depending on the type of attack *(i.e.,* grand mal, petit mal, etc.). According to Weisberg "one should not attempt to stop an attack of grand mal or petit mal." Weisberg further opined that,

> It is necessary to position the head, if possible, to facilitate breathing. To prevent the tongue from being bitten or from obstructing the windpipe, one should, if possible, place a pad between the teeth during a grand mal attack. The patient needs to sleep after the attack has run its course.
>
> Suggestions for treatment include a regular well-balanced diet. No Alcoholic beverages should

> be used. Regular amounts of sleep is important too. Physicians prescribe anticonvulsive drugs and need to monitor these carefully to avoid toxicity.

Because plaintiff had submitted Weisberg's letter, Judge Russell denied defendant MMH's motion to dismiss by order of October 16, 1995. On or about December 4, 1995 defendant MMH filed a motion for summary judgment, claiming that plaintiff failed to provide requisite expert proof to support her medical malpractice claim. MMH claimed that Weisberg's letter was "a letter of recommendation and appear[ed) to have no bearing whatsoever on Ms. Nadel's case against MMH." MMH accurately contended that Weisberg's letter did not mention the February 14 incident nor MMH's treatment of plaintiff on February 14, 1992. On March 8, 1996 plaintiff opposed defendant's motion for judgment claiming that "[s]ince [she] did not write out [her] complaint for Medical Malpractice[,] expert testimony is not necessary. Although [she] now [had] an expert witness that [would] testify on [her] behalf, it is not a requirement to have one." Defendant MMH replied by letter memorandum of March 18, 1996 contending that plaintiff's action against MMH was in fact a medical malpractice claim which requires expert testimony.

The parties argued orally before Judge Weinstein on March 20, 1996. Judge Weinstein then found that

> there has been adequate time to complete discovery. In fact the time for discovery in this case is long since run. This is a 1994 docket. The case being several years old. And I have to determine for the purposes of this motion whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

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. . .

> I find the case and the facts in this case as presented to me by the certifications of both parties . . . is so overwhelmingly one-sided in favor of the defendant in this case, the Court [is] absolutely compelled to grant summary judgment on behalf of the defendant and to dismiss the complaint, and it's more than failure to present an expert's report. It's on the very facts of the case itself. And without an expert, the plaintiff cannot get to the jury. I am not dismissing it for failure to provide an expert's report alone. I'm looking at all the facts of the case in the light most favorable to the opposing party, which is the plaintiff; and I am finding as a matter of law that those facts are so overwhelmingly one-sided in favor of the defendant Morristown Memorial Hospital that the Court under the *Brill* standard and after carefully evaluating the facts as I am instructed to do under that case, I am compelled to enter summary judgment against the plaintiff and on behalf of defendant, Morristown Memorial Hospital
>
> . . . .

Judge Weinstein dismissed plaintiff's complaint against MMH in an order of March 20, 1996.

IV.

We conclude that Judge Friend properly dismissed plaintiff's State tort claims against the Morristown defendants for failure to comply with the notice provisions of the New Jersey Tort Claims *N.J.S.A.* 59:8-8; *N.J.S.A.* 59:8-9. Plaintiff concedes that she did not comply with the notice provisions. We reject her various

justifications for failing to so comply as clearly without merit. *R.* 2:11-3(e)(l)((A) and (E).

Plaintiff correctly observes that failure to file such a notice does not bar her federal claim under the Federal Civil Rights Act, 42 *U.S.C.A.* § 1983. *Fuchillo v. Layman,* 109 N.J. 319, *cert. denied,* 448 *U.S.* 826, 109 *S.Ct.* 75, 102 *L.Ed.*2d 51 (1988); Gann, *Claims Against Public Entities,* comment on N.J.S.A. 59:8-8, 142-43 (1995). Federal and state courts have concurrent jurisdiction over § 1983 claims. *Tancrel v. Mayor and Council Bloomfield Tp.,* 583 *F.Supp.* 1548 (D.N.J. 1984). The judge erred in ruling that federal court was the exclusive forum for plaintiff's civil rights claim.

Plaintiff contended that "the lack of training of Fireman and Policeman to recognize and know how to deal with an epileptic seizure is the basis of discrimination against plaintiff." We agree with the Morristown defendants that any remand on the civil rights claim would be futile, however. Plaintiff does not set forth a viable claim of federal civil rights violations against the Morristown defendants.

In the leading authority, plaintiffs filed suit against the City of New York and other defendants for violation of § 1983 because pregnant women who worked for the Department of Social Services and the Board of Education of the City of New York were forced to take leaves of absence without pay before the leaves were medically necessary. *Monell v. Dep't of Social Services of the City of New York,* 436 *U.S.* 658, 98 *S.Ct.* 2018, 46 *L.Ed.*2d 611 (1978). The Supreme Court of the United States found that "local government units [are among] the persons to whom § 1983 applies." *Id.* at 690, 2035. The Court ruled that,

> a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its law makers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.
>
> [*Id.* at 694, 2038].

The Court found the municipality liable, noting that "this case unquestionably involves official policy." *Id.* at 694-95, 2038

The Supreme Court of the United States has held that "the inadequacy of police training may serve as the basis for section 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom police come into contact." *Canton v. Harris,* 489 U.S. 378, 388, 109 *S.Ct.* 1197, 1204, 103 *L.Ed.*2d 412 (1989). The Court stated that "[t]he issue in a case like this one, however, is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent 'city policy.' " *Id.* at 390, 1205.

The federal Supreme Court found that:

> the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform. That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program." *Id.* at 390, 1206. The Court further noted

> that after establishing a "city policy" plaintiff must show that the inadequate training "actually caused" the indifference which resulted in a violation of her civil rights. *Id.* at 391, 1206.

In the present case the judge erred in finding that the federal court was the exclusive forum for plaintiff's § 1983 claim. However, the record clearly does not support a finding of a "city policy" evidencing a "deliberate indifference" on the part of the municipality, Morristown. We find nothing in this record to support a municipal policy of deliberate indifference in training police and firefighters to deal with medical emergencies. Indeed, the subject incident seems to have been handled promptly and appropriately, without actionable harm to plaintiff, and clearly without any violation of her federal civil rights. Summary judgment on this record was proper under the *Brill v. Guardian Life Ins. Co.* of Am., 142 *N.J.* 520, 540 (1995), standard. The federal Supreme Court has just recently, on April 28, 1997, restated the substantial burden of proof on plaintiffs attempting to show municipal liability under § 1983 in a cognate context, hiring:

> Cases involving constitutional injuries allegedly traceable to an ill-considered hiring decision pose the greatest risk that a municipality will be held liable for an injury that it did not cause. In the broadest sense, every injury is traceable to a hiring decision. Where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into *respondeat superior* liability. As we recognized in *Monell* and have repeatedly reaffirmed, Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights. A failure

> to apply stringent culpability and causation requirements raises serious federalism concerns, in that it risks constitutionalizing particular hiring requirements that States have themselves elected not to impose.
>
> [*Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 6 *L.W.* 4286, 4291-92 (1997)].

We are satisfied that plaintiff has not made the showing required by federal law of a city policy of deliberate indifference to the handling of medical emergencies.

V.

Plaintiff also asserts claims under Title II of the Americans with Disabilities Act of 1990 (ADA), 42 *U.S.C.A.* § 12101 to __, and the Rehabilitation Act of 1973, 29 *U.S.C.A.* § 794. No doubt state courts may exercise concurrent jurisdiction with federal courts where claims are asserted under these acts. *See Yellow Freight System, Inc. v. Donnelly*, 494 *U.S.* 820, 823, 110 *S.Ct.* 1566, 1568, 108 *L.Ed.*2d 834 (1990) (finding concurrent jurisdiction over Title VII of the Civil Rights Act of 1964); *Sheilds v. City of Shreveport*, 579 *So.*2d 961, 966 (La. 1991); *Tyler v. City of Manhattan*, 857 *F. Supp.* 800, 812 (D. Kan. 1994); *N.J. Cit. Act v. Riviera Motel*, 296 *N.J. Super.* 402, 414 (App. Div. 1997)(a case where the court found that a nonprofit advocacy organization disabled persons had standing to bring an action against a motel for violations of certain laws, including Title III of the Americans with Disabilities Act, because defendant's motel was not accessible to persons with disabilities); *Krouse v. American Sterilizer* Co., 872 *F.Supp.* 203 (W.D. Pa. 1994); *Barber v. Guay*, 910 *F. Supp.* 790 (D. Me.

1995).[2] However, we conclude that a remand of the federal claims is not required. Plaintiff has described a single incident where she received emergency care for an epileptic episode. We find no basis in her claim for relief under the ADA or the Rehabilitation Act as a victim of disability discrimination. From what we can tell on this record, she received prompt, adequate attention with no perceptible injury or damages. The claim is clearly without merit under these federal statutes. *R.* 2:11-3(e)(2)(E).

VI.

Finally, we conclude that Judge Weinstein did not err in entering summary judgment against plaintiff for failure to provide an expert report and because "as a matter of law . . . [the] facts are so overwhelmingly one-sided in favor of the defendant Morristown Memorial Hospital . . . ."

Plaintiff contends that this is an assault and battery false imprisonment claim against the hospital. She contends that she is not required to produce expert testimony to support such a claim. We disagree. The hospital rendered emergency treatment to a seizure victim brought in by the ambulance squad. We find no apparent or obvious deviation from the standard care rendered in emergencies like this in this record. Plaintiff was kept in the hospital for a few hours and then was released. Our law has long recognized emergencies as exceptions to the doctrine of consent.

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2. For other cases finding concurrent jurisdiction over claims under the Rehabilitation Act see *Spaulding v. Mingo County Bd. of Ed.*, 897 *F. Supp.* 284 (S.D. W.Va. 1995) (student allegedly denied special education and related services); *Capitano v. State of Arizona*, 875 *P.*2d 832 (Ariz. Ct. App. 1993), *rev. denied* (1994) (employment discrimination) and *Elek v. Huntington National Bank*, 573 N.E.2d 1056 (Ohio 1991) (employment discrimination).

Appendix D

See Perna v. Pirozzi, 92 *N.J.* 446, 461 (1983); *Bennan v. Parsonnet*, 83 *N.J.L.* 20 (Sup. Ct. 1912) (Garrison, J.) Without expert testimony plaintiff presented no *prima facie* case of medical malpractice or of excessive or improper treatment in this emergency context. A jury or fact-finder could only speculate as to the merits of plaintiff's claim without expert guidance. We cannot permit a jury to so speculate.

Affirmed.

I herby certify that the foregoing is a true copy of the original on file in my office.

s/ R. Emille Cox
Clerk

APPENDIX E — ORDER OF THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DENYING RECONSIDERATION FILED JUNE 26, 1997

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.	A -005197-95T1
MOTION NO.	M -006735-96
BEFORE PART:	B
JUDGE(S):	KING
	CONLEY
	LOFTUS

ROSLYN NADEL

VS

MORRISTOWN FIRE DEPARTMENT ET AL

MOTION FILED: JUNE 06, 1997 BY: ROSLYN NADEL

SUBMITTED TO COURT: JUNE 23, 1997

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 24th DAY OF June, 1997, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT
— FOR RECONSIDERATION
— FOR ASSIGNMENT OF COUNSEL

Appendix E

GRANTED	DENIED	OTHER
( )	(✓)	( )

SUPPLEMENTAL:

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ R. Emille Cox
Clerk

FOR THE COURT:

s/ Michael Patrick King U.J.A.D.
MICHAEL PATRICK KING

APPENDIX F — ORDER OF THE SUPREME COURT OF NEW JERSEY DENYING PETITION FOR CERTIFICATION FILED OCTOBER 29, 1997

SUPREME COURT OF NEW JERSEY
C-376 September Term 1997
44,525

ROSLYN NADEL,

Plaintiff-Petitioner,

v.

MORRISTOWN FIRE DEPARTMENT, et al.,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-5197-95 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 28th day of October, 1997.

Appendix F

I hereby certify that the
foregoing is a true copy of the
original on file in my office.

s/ Stephen Townsend
CLERK OF THE SUPREME
COURT OF NEW JERSEY

s/ Stephen Townsend
CLERK OF THE SUPREME COURT

APPENDIX G—ORDER OF THE SUPREME COURT OF NEW JERSEY DENYING PETITION FOR RECONSIDERATION FILED JANUARY 28, 1998

SUPREME COURT OF NEW JERSEY
M-675 September Term 1997
44,525

ROSLYN NADEL,

Plaintiff-Movant,

v.

MORRISTOWN FIRE DEPARTMENT, et al.,

Defendants.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of the petition for certification is denied.

WITNESS, the honorable Deborah T. Poritz, Chief Justice, at Trenton, this 27th day of January, 1998.

s/ Stephen Townsend
CLERK OF THE SUPREME COURT

Appendix G

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

s/ Stephen Townsend
CLERK OF THE SUPREME
COURT OF NEW JERSEY

APPENDIX H — STORIES FROM *THE WASHINGTON POST* DATED SEPTEMBER 15, 1997 AND SEPTEMBER 24, 1997

Rights Issues on Trial in Metro Incident

Epileptic's Assault Conviction Thrusts Case Into Debate About Disabled

By Brooke A. Masters
Washington Post Staff Writer
Monday, September 15, 1997; Page A01
The Washington Post

On Metro's Orange Line one morning in May, a man sitting near Lavita Haugabrook suddenly grabbed her left arm. Frightened, the 23-year-old file clerk tried to free herself and told him to let go. But he said nothing and started to pull her out of her seat.

Finally, one of Haugabrook's co-workers who happened to be on the train forced the man to release her and, still without saying a word, her assailant moved away and got off at the next stop. Haugabrook called police.

Two days later, Metro police arrested Scott Vining, of Clinton. A simple case of assault? Not quite.

Vining, 35, has epilepsy, and he says he was having a seizure on the Metro that morning. But despite a letter from Vining's doctor and testimony about his previous seizures, an Arlington judge found him guilty and, according to those in court that day, threatened to jail him if he grabbed anyone again.

The incident comes at a time of national debate about how far to take sensitivity to the rights of the disabled. There is overwhelming

legal and public support for the idea that society should do everything possible to allow people with disabilities to participate fully. But what about people whose conditions cause them to take actions that embarrass, upset or endanger others?

Like about 60 percent of adults with epilepsy, Vining has periods in which he loses consciousness and may act strangely, fumble at something, snap his fingers. But his advocates say he shouldn't be held responsible for actions he can't control.

"There are some risks necessary to have a free society, and one of the risks you take is that someone might have a seizure in front of you," said Michaele Battles, Vining's civil attorney and a specialist in epilepsy cases. "The judge's decision was idiotic."

Haugabrook, who lives in District Heights, doesn't see it that way. Although she acknowledged that Vining has epilepsy, she said that is "just an excuse" for his behavior.

"If his medication wasn't working, he shouldn't have been on the train," she said. "I don't want to have to avoid him. It's my transportation, and I shouldn't have to be inconvenienced."

That was also the opinion of Griffin T. Garnett Jr., a substitute judge in Arlington County General District Court. On July 17, he found Vining guilty of simple assault and ordered him to stay away from Haugabrook.

The judge and Assistant Commonwealth's Attorney Valerie Price would not comment on the case because sentencing is scheduled for Sept. 23. Vining faces up to a year in jail and a $2,500 fine.

Appendix H

An estimated 2 million Americans — one in 100 — have epilepsy. Vining's behavior on the train was consistent with what are called complex partial seizures, his doctor and other medical experts said. His medication helps control the episodes but can't eliminate them.

Run-ins with the police are a common problem for people who, like Vining, black out when their brains short-circuit, the experts said. Some people, for example, appear drunk when they have seizures. Others disrobe. If grabbed, they may hit back.

"This is the brain's way of putting out the fire. They can walk, they might lash out or grab people, but they're not really conscious," said Harvard University neurologist Steven C. Schacter, who has written widely about epilepsy. "I have had patients come to in a jail cell."

That's why Vining plans to appeal. "The law requires that [an assault] be a voluntary action, and he didn't have the intent," said his criminal attorney, Alan Rosenblum.

Until the early part of this century, people with epilepsy were forbidden to marry, and some were locked up in institutions, Schacter said. Eventually, drugs were developed that allowed patients to live normally.

In the late 1970s and early 1980s, courts saw several cases in which defendants — including a New York City police officer — claimed they were having seizures at the time they committed violent acts. But the strategy generally failed in cases in which the violence involved controlled movements, such as unholstering a gun or firing several shots, and drew criticism from epilepsy groups, who said it fostered negative views of people with the ailment.

Appendix H

Now that there is heightened sensitivity to the rights of the disabled, more recent court cases about epilepsy have tended to involve allegations that police mishandled people who were having seizures.

In 1986, police in a town in Prince George's County shot and killed a man who apparently suffered a seizure and struggled with them after they tried to stop him from crawling around the floor of restaurant. Two years later, Howard County police drew complaints about their treatment of a Columbia man who used epilepsy as his defense in several criminal cases.

Conflict between disabled people and those who object to their appearance or behavior in public is growing, in part because the Americans With Disabilities Act has made jobs and public facilities more accessible, advocates said.

"People without disabilities are extremely ignorant about how to interact with people with disabilities, and their attitudes are Draconian," said Jan Garrett, a staff lawyer with the Disability Rights Education and Defense Fund. She was born without limbs and has become accustomed to people changing seats or looking away when she approaches in her wheelchair.

Slightly more than 11 percent of all complaints under the disabilities act are filed by people with neurological disorders including epilepsy, said Michael Widomski, a spokesman for the Equal Employment Opportunity Commission.

For Vining, a document clerk who works mostly with electronic data at a Ballston company, epilepsy has been a constant problem since he had spinal meningitis as an infant. He has passed out while mowing the lawn. Potential employers have hustled him out of interviews after learning of his condition.

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But he's married and holds down a job, commuting by bus or van pool and subway because he's not allowed to drive. He is on Metro's committee for elderly and handicapped riders.

In a good year, he has two or three seizures. This has been a bad year. He has had about 25 attacks, and at least two of them were on public transportation, he said.

Several weeks before the incident with Haugabrook, Vining was talking to Daryl Hawkins, a contract analyst, on the bus they ride to their homes in Clinton when Vining suddenly became flushed, Hawkins said.

"He grabbed my arm and then my shoulder. . . . I almost hit him." Hawkins said. "It kind of scared me." When Vining didn't respond to questions, Hawkins moved to the back of the bus. Later, when Vining tried to talk to him and said, "I have epilepsy," Hawkins walked away.

But then, Hawkins reconsidered. "The more I thought about it, it bothered me," he said. "The next time I saw him, I went up and apologized."

At Vining's trial, Hawkins testified about the previous seizure, and Vining's wife described his condition. But the judge said in court that he wouldn't give much weight to their statements, witnesses said. There is no transcript.

It would be easier, Hawkins said, if Vining wore a bracelet saying he has epilepsy, but Vining and advocates for the disabled said requiring that would violate the privacy rights of people who have seizures.

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"I feel like [the judge] is penalizing me for not having any visible handicap," Vining said. ". . . I am not a violent individual. I am not a criminal."

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Appendix H

Va. Judge Reverses Himself, Clearing Epileptic of Assault

By Marylou Tousignani
Washington Post Staff Writer
Wednesday, September 24, 1997; Page B01
The Washington Post

An Arlington County judge reversed himself yesterday, saying that on reconsideration, an epileptic man should not have been found guilty of assault for grabbing a woman's arm during a seizure on a Metro train.

Judge Griffin T. Garnett Jr. dismissed the guilty verdict against Scott D. Vining, 35, of Clinton, after his attorney provided a videotape to the prosecutor of Vining having seizures.

The tape — part of an effort to persuade the judge and prosecutor — was shot over six days at George Washington University Hospital, when Vining voluntarily stopped taking his medication to prove that his epilepsy could cause the behavior he exhibited on the Metro train on May 19.

In vacating his verdict, Garnett said that he now finds no evidence that Vining acted willfully or in anger when he grabbed the arm of Lavita Haugabrook, 23, a fellow Orange Line commuter, and refused to let go until a third rider intervened. Garnett had found Vining guilty of simple assault in July, despite a letter from his doctor and testimony about his previous seizures.

The case has drawn national attention to the sensitive question of how best to accommodate the rights of the disabled within society at large. Vining and his accuser appeared on national television Monday night to tell their sides of the story, and advocates for

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the disabled attended yesterday's hearing, which was to have been a sentencing for Vining.

The prosecutor who had obtained Vining's conviction joined the defense yesterday in seeking the dismissal, saying that videotape convinced her that Vining did not commit an intentional act when he grabbed Haugabrook on the Metro. The tapes show several seizures, including some in which he lunges at a person or persons nearby.

Like many of the 2 million Americans who have epilepsy, Vining's doctors say, he suffers from complex partial seizures. They can cause him to black out — with no control over the event and no memory of what occurred during it. During the episodes he may act strangely, fumble at something or snap his fingers. His medication helps control the episodes but can't eliminate them.

Haugabrook was not in court yesterday, but her mother and stepfather, who were, expressed dismay at the outcome. "I don't believe this" said Diane Johnson, shaking her head as Garnett let Vining go free. "He hasn't said one time, 'I'm sorry.' "

But outside the courtroom shortly afterward, Vining did just that. "I am deeply, deeply sorry about what your daughter experienced," he told Johnson. "I had no knowledge. . . . If I had, I would have done everything humanly possible to explain what happened."

Responded Johnson: "This has been blown out of proportion and my daughter has not been treated fairly. I accept your apology, but my daughter still believes she was in danger and I believe the same thing."

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Vining faced up to a year in jail and a $2,500 fine on the charge. Johnson said she didn't think he deserved jail time, "but he should have been reprimanded and told he's dangerous to himself and others."

Vining, who rides public transportation to his job in Northern Virginia because his medical condition prevents him from driving, said he will reconsider his decision not to wear a bracelet indicating he has epilepsy. He said he used to wear one but it didn't help him if he had a seizure.

Alexandra K. Finucane, vice president of the Epilepsy Foundation of America, who attended yesterday's court session, said the case "demonstrates the crying need for educating not only the general public about epilepsy but also the police, prosecutors and even the judiciary."

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No. 98-357

In The

Supreme Court of the United States

October Term, 1997

ROSLYN NADEL,

Petitioner,

vs.

MORRISTOWN FIRE DEPARTMENT, MORRISTOWN POLICE DEPARTMENT, and MORRISTOWN MEMORIAL HOSPITAL,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey Appellate Division

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This petition seeks review of the denial of a certification petition to the Supreme Court of the State of New Jersey. The facts of this case are set forth accurately in the New Jersey Appellate Division Decision. App. 11a-18a. In summary, the petitioner, Roslyn Nadel, who suffers from psychomotor epilepsy, experienced a seizure while walking in the Town of Morristown on February 14, 1992. When two Morristown firefighters found her lying in the gutter in apparent distress, they radioed the police, who in turn called an ambulance. As the petitioner attempted to get up, she began to walk into traffic. She was incoherent and did not respond to questions put to her. The firefighters held her until the ambulance came within the next few minutes, and she was then taken to Morristown Municipal Hospital, where she was kept under observation and in restraints for several hours, until her release. Morristown's[1] involvement in this matter was limited to the few minutes when Nadel, in the course of a seizure, was stopped from walking into traffic and put into an ambulance.

Nadel petitions this Court for certiorari, asserting that hers is a case which is representative of discrimination faced by disabled people, in general, and people with epilepsy in particular. She claims that this case gives this Court an opportunity to establish guidelines for vulnerable people such as herself, and assure that firefighters and police officers are properly trained when dealing with epileptics in the course of a seizure.

---

1. The complaint names "Morristown Fire Department" and "Morristown Police Department" as defendants. The Fire Bureau and Police Bureau are not independent entities, but divisions within the municipal government of the Town of Morristown. The municipal defendants are hereinafter referred to as "Morristown" or "the Town."

A. The petition misrepresents the Town's actions as forming a pattern of conduct which is so pervasive and so permanent as to constitute a force of law.

The bare facts as stated in the petitioner's complaint do not support a claim of civil rights violation against the petitioner. Insofar as the Town of Morristown was concerned, this case involves a single incident lasting not more than five minutes. The police and firefighters were in no way attempting to take the petitioner into custody, but rather were seeking medical assistance for someone in obvious distress. In an effort to demonstrate that this incident was representative of a pervasive pattern of behavior on the part of the police, petitioner observes that similar incidents occurred in other "public entities." Pet. 7. The actions and activities of police officers in other municipalities have no bearing on petitioner's claim against the Town of Morristown, and cannot be used to support a claim of governmental custom or practice.

In this case there was no arrest, the petitioner was not taken into custody, and there was no evidence of discrimination of any kind. The limited actions of the Town did not give rise to a cause of action, and certainly were not indicative of discrimination against disabled persons.

B. Petitioner misrepresents the actions of the Town by not differentiating between her situation as an individual in medical distress, and the arrest and incarceration of a disabled individual who is "acting strangely."

The petition asserts that the Town's alleged failure to train its police and fire personnel in the area of disabilities, particularly in the area of epilepsy, amounts to discrimination and a violation of her rights under the Americans with Disabilities Act. Pet. 11-14. In quoting the brochure by the

Police Executive Research Forum and Epilepsy Foundation of America: *TAKE ANOTHER LOOK*, with respect to the concerns of the civil rights of epileptics, the brochure states:

> Police officers should always consider the possibility that a disability is involved when faced with impaired responsiveness of behavior that doesn't seem to make sense, or when called to a situation when someone is said to be "acting strangely"
>
> The Americans with Disabilities Act prohibits discriminatory treatment of people with all types of disabilities, including epilepsy. *Taking people into custody solely because of actions or behavior caused by disability deprives them of their rights and may be a violation of the Act.*

(Emphasis added).

By quoting this paragraph in connection with this matter, as well as a similar discussion from the *Americans With Disabilities Act Handbook* and an irrelevant and gratuitous news story about an epileptic wrongly convicted for assault in Virginia (App. 34a-39a) and petitioner attempts to leave the Court with the impression that the police "took her into custody" because she was acting strangely. She then argues that absent adequate training, "this unnecessary abuse will continue." Pet. 14. This clearly misrepresents the facts in this case. She was not arrested or taken into custody. Morristown personnel at the site recognized a medical situation, and attempted to respond to it. The Appellate Division, properly made the following finding:

> . . . (T)he record clearly does not support a finding of "city policy" evidencing a "deliberate

> indifference" on the part of the of the municipality, Morristown. We find nothing in the record to support a municipal policy of deliberate indifference in training police and firefighters to deal with medical emergencies. Indeed, the subject incident seems to have been handled promptly and appropriately, without actionable harm to plaintiff, and clearly without any violation of her federal civil rights. App. 24a.

REASONS FOR DENYING THE WRIT

1. There is no decision in this case involving an important federal question in a way that conflicts with either the decisions of any other state court of last resort or of a United States court of appeals, and thus the criteria set forth in Supreme Court Rule 10(b) are not satisfied. Petitioner cites no cases that would support a conflict of lower court opinions as a basis for granting the petition. Insofar as the case presented against the Town is concerned, it involves an isolated incident. Petitioner presents no evidence that there are individuals within the Town of Morristown who are suffering seizures on a regular basis, and that either as a matter of practice or formal policy, police officers and firefighters are wantonly and recklessly treating such people improperly. Nor has she demonstrated that, assuming such wanton or reckless treatment, there are no legal remedies available. The Town submits that she would have to present the Court with a scenario of that magnitude, and demonstrate that the New Jersey courts differed in their treatment of such cases from other state or federal courts, in order to satisfy the requirements of Supreme Court Rule 10(b).

2. The Appellate Division of the Superior Court of New Jersey properly found that there was no basis to support a claim under 42 U.S.C. § 1983 or the Americans with Disabilities Act

and the Rehabilitation Act of 1973. The petition presents no important question of federal law that should be addressed by this Court pursuant to Supreme Court Rule 10(c). The Appellate Division correctly found that in this case there was no cause of action stated pursuant to federal civil rights legislation, to the Americans with Disabilities Act and the Rehabilitation Act of 1973.

The language of 42 U.S.C. § 1983 states in pertinent part as follows:

> Every person who, **under color of any statute, ordinance, regulation, custom or usage** of any State or Territory of the District of Columbia, subjects or causes to be suggested, any citizen of the United States or other person within the jurisdiction thereof to the **deprivation of any rights, privileges, or immunities secured by the Constitution and laws** shall be liable to the party injured in the action at law, in equity, or any other proper proceeding for redress.

(Emphasis added).

In order to make a *prima facie* claim under 42 U.S.C. § 1983 petitioner must first allege that there is some law or regulation that the public entity adopted that operated to injure the plaintiff by depriving her of her rights under the Constitution. In the absence of a formal law or regulation, she must demonstrate that the custom or usage was so pervasive and so permanent as to constitute force of law. *Monell v. New York City Dept. of Social Services et al.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1977). The failure to train can constitute a violation of 42 U.S.C. § 1983 "only where the failure to train amounts to a deliberate indifference to the rights

of persons with whom the police come into contact." *Canton v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989). This pleading is necessary, because in the absence of a proven policy which violates the plaintiff's rights, the municipality will not be held liable merely because it employs a tortfeasor who may have violated the plaintiff's rights. The Court in *Monell* and *Canton* specifically rejected a *respondeat superior* theory of liability on the part of the municipality.

The Supreme Court in *Canton* addressed the issue of when lack of training constitutes "deliberate indifference." *Canton* involved the arrest of the plaintiff, who was apparently incoherent at the time of processing. When asked if she needed medical attention, plaintiff did not give a coherent response. Her behavior included slumping to the floor several times, until finally the police placed her on the floor to keep her from falling. No medical help was summoned. Within an hour of taking her into custody, the family was summoned and the plaintiff was released to the family's care and taken by ambulance to the hospital. The plaintiff, who was apparently suffering from severe emotional problems, was then hospitalized for a week and received outpatient treatment for a year thereafter.

Subsequent to her release, the plaintiff filed suit against the City of Canton, asserting that the municipal regulation authorizing shift commanders, in their sole discretion, to determine whether a detainee needed special medical care in the event that he or she was unconscious or semi-conscious, or unable to explain his or her condition, violated her constitutional rights under the Due Process Clause of the Fourteenth Amendment, to receive necessary medical care while in police custody.

In determining whether or not an absence of training constitutes deliberate indifference to the rights of the inhabitants

of Canton to the point where such shortcoming could be thought of as a policy of custom, the Supreme Court held that one must determine whether the training program is adequate, and if not, whether the inadequacy represents city policy. The Court observed:

> In resolving the issue of a city's liability, the focus must be on the adequacy of the training in relation to the tasks the particular officer must perform. That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program. [citations omitted]. . . . Neither will it suffice to prove that an injury or accident could have been avoided if an officer had better or more training to equip him to avoid the particular injury-causing conduct. **Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal.** And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.

Canton v. Harris, 489 U.S. 378, 390-391 (emphasis added).

Applying this standard, the Appellate Division properly found that the facts alleged simply did not support a finding of liability on the part of the Town of Morristown under a § 1983 claim. Petitioner presented no facts that supported the unsubstantiated claim of inadequate training. No facts even addressed the existence or non-existence of any policy or

practice within the Town of Morristown to support such a claim. Thus, even if, *arguendo*, the petitioner could somehow show that the firefighters and police acted improperly, such actions were at worst an error in judgment, a case of "adequately trained officers who occasionally make mistakes," and not a violation of petitioner's civil rights. There is no evidence that the incident that occurred on February 14, 1992 was anything more than an isolated event. There is simply no legal or factual basis to conclude that petitioner was a victim of discrimination, by virtue of her disability or for any other cause.

On this record, the New Jersey courts properly found that summary judgment against the petitioner should be affirmed, applying the standard set forth in *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 666 A.2d 146 (1995). Clearly, no novel legal issues were presented warranting this Court's consideration, or the granting of the petition.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey Appellate Division

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STATEMENT OF THE CASE

On February 14, 1998 plaintiff Roslyn Nadel filed a complaint for damages against the named defendants including Morristown Memorial Hospital (MMH) alleging that she had been unlawfully detained against her will following an epileptic seizure while crossing Speedwell Avenue in Morristown, New Jersey. When plaintiff "regained consciousness," she discovered she was being restrained by two firefighters. Thereafter, the police and ambulance arrived whereupon the ambulance squad put her on a stretcher, strapped her in and transported her to MMH.

A memorandum dated March 14, 1994, prepared by firefighter James M. Schultz concerning the events surrounding plaintiff's claim, referred to by the Appellate Division in its May 28, 1997 decision, stated that he and his fellow firefighter, Stanton, "observed a woman lying in a gutter in front of the West Tower Headquarters Place on Speedwell Avenue in Morristown". Upon approaching the woman, later identified as the plaintiff, firefighters Schultz and Stanton inquired of her whether she was okay. Her response, according to Mr. Stanton, "was not understood as her verbalization was impaired and she appeared to be disoriented. When she stood up, plaintiff started to walk into traffic and was almost hit by an approaching vehicle." (App. 14a-15a). After observing her condition, the firefighters positioned themselves in an effort to protect the plaintiff and continued to try to communicate with her. However, plaintiff became agitated and efforts to communicate with her proved futile.

Firefighter Stanton's memorandum recited that they were approached by "[a] bystander", presumably plaintiff's friend "Michael", who informed them that plaintiff suffered from seizures. When Mr. Stanton tried to obtain information about

plaintiff including her pertinent medical history and medications she might be taking, "the bystander just walked away repeating that she suffered from seizures before." (App 15a.)

Thereafter, the firefighters advised the police officers and ambulance squad of what had occurred and turned plaintiff over to the care of the ambulance squad. Mr. Schultz noted in his memorandum that plaintiff had become "very hostile and combative."

Upon her arrival at Morristown Memorial Hospital, according to the emergency room progress notes, plaintiff was "agitated and screaming." She was "pulling [at] wrist restraints" and stated "I'm going to sue all of you." Plaintiff's records from a prior admission to the hospital were obtained which reflected that she "has [a history of] sociopathic behavior." Once she had calmed down, plaintiff was permitted to make a telephone call. She contacted an attorney, Ira Ginsberg, who later picked her up from the hospital.

As a consequence of the incidents alleged, plaintiff claimed that she suffered disgrace, humiliation and shame as well as emotional distress and nervous shock. She asked her neurologist, Dr. Melvin Vigman to refer her to a psychiatrist. Plaintiff visited David G. Miller, M.D. who stated in a letter of October 19, 1992 that he had treated plaintiff since March 16, 1992 at which time she was suffering from "a Major Depressive Disorder, as well as Post-Traumatic Stress Disorder." Her symptoms, according to Dr. Miller, had improved with treatment. The October 19, 1992 letter recited plaintiff's "very traumatic life" consisting of multiple physical handicaps and long-term involuntary hospitalization during childhood.

Plaintiff had been struck by a car in 1989 and was treated at MMH for her injuries. Dr. Miller believed that plaintiff's

treatment at MMH following the incident in issue "reactivated many of her fears and negative reactions which had occurred during her previous treatment at Morristown Memorial Hospital in 1989." (App. 16a)

MMH filed its answer to the complaint on March 23, 1994 generally denying plaintiff's allegations. On March 8, 1995, MMH filed a motion to compel compliance with discovery demands made by MMH or alternatively dismiss plaintiff's action. Plaintiff had failed to respond to MMH's interrogatories and had failed to furnish medical expert information upon which she intended to rely in her case against the hospital.

Judge Friend entered an order on May 2, 1995 directing plaintiff to fully respond to MMH's interrogatories and provide medical authorizations within twenty days and expert reports within sixty days of the order. The order further provided that if plaintiff failed to provide the information set forth in the order, upon motion with notice to plaintiff, her complaint would be dismissed with prejudice as against the hospital.

On August 7, 1995, MMH moved to dismiss plaintiff's action for failure to comply with the May 2, 1995 order. On September 29, 1995 plaintiff filed her opposition to MMH's motion stating that she had found an expert, Dr. Phyllis G. Weisberg, whose letter was provided to MMH dated August 31, 1995. Plaintiff had been a student of Dr. Weisberg's at Trenton State College while she was enrolled in the Department of Special Education. On the basis of Dr. Weisberg's letter, Judge Russell denied MMH's motion to dismiss by order of October 16, 1995.

On December 4, 1995, MMH filed a motion for summary judgment on the ground that plaintiff had failed to provide the requisite expert proof needed to support her medical malpractice

action against the hospital. Dr. Weisberg's letter, MMH asserted, was in fact a letter of recommendation having no bearing upon Ms. Nadel's case against MMH. The letter, in fact, made no mention of the February 14, 1992 incident or treatment by MMH. Plaintiff opposed MMH's motion on March 8, 1996 claiming that "[s]ince [she] did not write out [her] complaint for Medical Malpractice [,] expert testimony is not necessary." On March 18, 1996, MMH replied to Ms. Nadel's papers in opposition stating that Ms. Nadel's action was, in fact, a medical malpractice action requiring expert testimony.

After Oral Argument on March 20, 1996, Judge Weinstein found that:

> the case and the facts in this case as presented . . . by the certifications, of both parties . . . is so overwhelmingly one-sided in favor of the defendant in this case, the Court [is] absolutely compelled to grant summary judgment on behalf of the defendant and to dismiss the complaint, and it's more than failure to present an expert's report . . . And without an expert, the plaintiff cannot get to the jury . . . I am not dismissing it for failure to provide an expert's report alone. I'm looking at all the facts of the case in the light most favorable to the opposing party, which is the plaintiff; and I am finding as a matter of law that those facts are so overwhelmingly one-sided in favor of the defendant Morristown Memorial Hospital that the Court under the *Brill* standard and after carefully evaluating the facts as I am instructed to do under that case, I am compelled to enter summary judgment against the plaintiff and on behalf of defendant, Morristown Memorial Hospital . . .

(App. 21a). Plaintiff's complaint was subsequently dismissed as against MMH by order of March 20, 1996. (App. 21a).

On appeal to the Appellate Division, that court concluded that Judge Friend had properly dismissed the case against the Morristown defendants under the New Jersey Tort Claims Act although it found that the Judge erred in finding that the federal court was the exclusive forum for plaintiff's action under the Federal Civil Rights Act, 42 U.S.C.A. § 1983. The Appellate Division, however, found nothing in the record to support a claim of a "city policy" evidencing "deliberate indifference" on the part of the City.

With regard to Plaintiff's claim under Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C.A. §§ 12101-12132, and the Rehabilitation Act of 1973, 29 U.S.C.A. § 794, the court concluded that while, no doubt, the state courts are vested with concurrent jurisdiction to hear claims asserted under the Acts, the single incident describing receipt of emergency care for the epileptic episode provided no basis for a claim under the ADA or the Rehabilitation Act for disability discrimination. Said the Court:

> From what we can tell on this record, she received prompt, adequate attention with no perceptible injury or damages. The claim is clearly without merit under these federal statutes. R. 2:11-3(e)(2)(E).

(App. 26a). Finally, the Appellate Division found that Judge Weinstein had not erred in granting summary judgment to MMH for plaintiff's failure to provide an expert report since "as a matter of law . . . [the] facts are so overwhelmingly one-sided in favor of the defendant Morristown Memorial Hospital . . ." Said the Appellate Division with regard to plaintiff's late claim that her case sounded in assault and battery:

> . . . Plaintiff contends that this is an assault and battery false imprisonment claim against the hospital. She contends that she is not required to produce expert testimony to support such a claim. We disagree. The hospital rendered emergency treatment to a seizure victim brought in by the ambulance squad. We find no apparent or obvious deviation from the standard care rendered in emergencies like this in this record. Plaintiff was kept in the hospital for a few hours and then was released. Our law has long recognized emergencies as exceptions to the doctrine of consent. *See Perna v. Pirozzi*, 92 N.J. 446, 461 (1983); *Bennan v. Parsonet*, 83 N.J.L. 20 (S. Ct. 1912) (Garrison, J.) Without expert testimony plaintiff presented no prima facie case of medical malpractice or of excessive or improper treatment in this emergency context. A jury or fact-finder could only speculate as to the merits of plaintiff's claim without expert guidance. We cannot permit a jury to so speculate.

(App. 26a-27a). Plaintiff sought reconsideration of the order by the Appellate Division which motion was denied June 24, 1998. (App. 28a-29a) Plaintiff's Petition for Certification to the New Jersey Supreme Court was denied on October 28, 1997. (App. 30a-31a)

A. Morristown Memorial Hospital is a private non-profit hospital organized for charitable purposes pursuant to N.J.S.A. 53A-8 and is not liable to plaintiff under the provision of The Americans with Disabilities Act which are relied upon by plaintiff.

Plaintiff's Petition for Writ of Certiorari makes virtually no mention of Morristown Memorial Hospital. In her Statement of the Case, plaintiff states that she asserted a claim against

MMH for "battery and false imprisonment." Pet. 3. In fact plaintiff's action against MMH was a medical malpractice action dismissed on motion for summary judgment as a consequence of plaintiff's failure to comply with a court order compelling her to provide an expert report to support her claim against the hospital.

Plaintiff's only statement of a basis for filing a petition to this Court as against MMH is as follows:

> Petitioner asserts that Morristown Memorial Hospital also is in violation of the Americans with Disabilities Act by restraining Nadel to a bed for three to four hours for having an epileptic seizure, without allowing her to make a telephone call[.]

(Pet. 14). Plaintiff does not state how her allegations constitute a claim against MMH under the Act. Plaintiff's only discussion of the Act, contained in her Petition, pertains to the failure of public entities to properly train their personnel in responding to disabled persons. (Pet. 10-14). Morristown Memorial Hospital is a private non-profit hospital entitled to charitable immunity pursuant to N.J.S.A. 53A-8. It is not a public entity and is not, therefore, encompassed by the provisions of the Americans with Disabilities Act as relied upon by the Plaintiff.

Moreover, MMH was never made subject to plaintiff's claims asserted in the New Jersey courts under the Americans with Disabilities Act. There is, therefore, no basis for plaintiff's Petition for Certiorari as against MMH.[1]

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1. Although MMH does not intend to seek damages or costs, it is respectfully submitted that plaintiff's claim against MMH is frivolous under Rule 42 of this Court.

REASONS FOR DENYING THE WRIT

1. There are no compelling reasons which would justify the Court's review of plaintiff's Writ of Certiorari as against MMH. Under Rule 10 of this Court, the decision by the New Jersey Courts in this case did not decide an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. The New Jersey Courts did not decide an important question of federal law that has not been, but should be, settled by this court nor did they decide an important federal question in a way that conflicts with relevant decisions of this Court. Plaintiff has not alleged any erroneous factual findings or misapplication of a properly stated rule of law as against MMH.

Plaintiff's petition, in fact, fails to state any basis for this Court to review the Writ of Certiorari as against Morristown Memorial Hospital. On the record concerning plaintiff's case, it is clear that the New Jersey courts properly affirmed the grant of summary judgment to Morristown Memorial Hospital having applied the standard set forth in *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 666 A.2d 146 (1995). The decision in favor of the hospital had no impact upon nor did it raise an important federal question warranting this Court's grant of plaintiff's petition.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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